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No. _____

In the Supreme Court of the United States

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES REAGAN,
Petitioners,

v.

JON MICHAEL WITHROW,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a district court, upon the plaintiff's written consent, refers a case to a magistrate judge for trial, *see* 28 U.S.C. §636(c), and all parties, the magistrate judge, and the jury proceed in a manner consistent with that referral, must a court of appeals *sua sponte* vacate the judgment for lack of jurisdiction because defendants did not expressly consent, or can defendants cure that alleged defect by confirming, in a post-judgment filing with the district court, their consent to trial before the magistrate judge?

LIST OF PARTIES

The caption for this petition includes all parties to the Fifth Circuit appeal. *See* SUP. CT. R. 14.1(b). Petitioners note, however, that the Fifth Circuit caption lists a fourth "Defendant-Appellee," Jerry Ballard. App. 1a. Ballard was not a party in the Fifth Circuit.

Plaintiff Withrow's claims against Ballard were dismissed prior to service and, therefore, Ballard never appeared at trial or in the Fifth Circuit. *See* R.713, 809.[1] Although the final judgment vacated by the Fifth Circuit reflects Ballard's pre-service dismissal, App. 28a, Withrow did not contest the dismissal on appeal. Because Ballard was never served, never appeared in the trial court or Fifth Circuit, and his dismissal was not challenged by Withrow, Petitioners do not list Ballard as a party "to the proceeding in the court whose judgment is sought to be reviewed." SUP. CT. R. 14.1(b).

1. References to documents that are in the Fifth Circuit record, but not included in the Appendix, will be designated "R.[page #]."

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PETITION FOR WRIT OF CERTIORARI

The courts of appeals are divided on the validity of a party's post-judgment consent to trial before a magistrate judge pursuant to 28 U.S.C. §636(c). The Fifth Circuit erroneously vacated a judgment after determining, *sua sponte*, that two parties did not expressly consent to the magistrate judge's authority prior to trial. The court disregarded the parties' post-judgment confirmation of consent, creating a square conflict with the Seventh and Eleventh Circuits, which consistently effectuate consent offered after judgment—even for the first time on appeal. The Ninth Circuit, like the Fifth, has rejected post-judgment consent; but its prohibition has been directed at statements outside the district-court record, not a post-judgment, trial-court filing, which occurred in this case. The conflict over post-judgment consent injects uncertainty into §636(c)'s civil-trial scheme, which is designed to promote speedy justice, not multiply proceedings. And further uncertainty arises from the Fifth Circuit's "jurisdictional" perception of consent, which is inconsistent with the Tenth Circuit's views on §636.

Both the Fifth Circuit's rigid interpretation of §636(c)—and its perception that consent controls subject-matter jurisdiction—raise significant questions about magistrate judges' civil-trial authority under §636(c). The Court should grant the petition for writ of certiorari to resolve these important and unsettled questions of federal law. *See* SUP. CT. R. 10(a), (c).

CITATION OF OPINIONS AND ORDERS

The Fifth Circuit's opinion is reported as *Withrow v. Roell*, 288 F.3d 199 (CA5 2002). App. 1a. The Fifth Circuit's limited remand order is unreported. App. 12a. Also unreported are the district court's order on remand adopting the magistrate judge's report and recommendation on consent, App. 14a, and the report and recommendation itself. App. 16a. The magistrate judge's final judgment on the merits, which the Fifth Circuit vacated for lack of consent, is unreported. App. 28a.

BASIS FOR JURISDICTION

The Fifth Circuit delivered its judgment and opinion on April 8, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

"Notwithstanding any provision of law to the contrary —

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. . . .

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." 28 U.S.C. §§636(c)(1)-(2).

STATEMENT OF THE CASE

Jon Michael Withrow, an inmate in custody of the Texas Department of Criminal Justice (TDCJ), brought this *pro se* suit under 42 U.S.C. §1983 alleging that various TDCJ doctors and

nurses were deliberately indifferent to his medical needs when he injured an ankle dismounting his cell bunk.

Prior to service on defendants, Withrow filed written consent to trial before a magistrate judge pursuant to 28 U.S.C. §636(c). App. 20a.[2] The district court referred the action to a magistrate judge for all purposes, including trial and entry of final judgment, but noted that the reference would be vacated if defendants, upon service, did not consent. App. 21a.

After being served and answering, Defendants Joseph C. Roell, M.D., Petra Garibay, L.V.N., and James Reagan, M.D., filed motions for summary judgment, which the magistrate judge denied. The magistrate judge's order confirmed that "[b]y order of reference entered December 30, 1997, this case was referred to the undersigned to conduct all further proceedings, including entry of final judgment, in accordance with 28 U.S.C. §636(c)(1)." App. 26a. At no point did any of these Defendants, or Plaintiff Withrow, object to the magistrate judge's representation of her authority.

At a subsequent status conference, the parties discussed the need for a newly added defendant's consent,[3] and the magistrate judge represented that "all of the other parties have consented" to her presiding at trial. App. 4a. Again, Defendants Roell, Garibay, and Reagan did not contest their consent, and neither did Withrow.

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2. Withrow also executed a consent form at a pre-service, screening hearing, R.821, but that first form is not in the record. At the hearing, an assistant attorney general appearing for the State of Texas as *amicus curiae* did not execute a consent form on behalf of the TDCJ employees named in Withrow's complaint because they had not been served, were not parties, and thus were not yet represented by the Office of the Attorney General. *See id.*

3. This added defendant, Danny Knutson, settled with Withrow before trial, mooting the issue of his consent.

Withrow's claims against Defendants Roell, Garibay, and Reagan proceeded to trial before a jury, with the magistrate judge presiding and Withrow representing himself. On the first day of trial, the magistrate judge informed the jurors: "In this case—or in any civil case in which both parties consent to my jurisdiction, I do have a civil jurisdiction to hear civil jury trials and that's what we have scheduled this morning." App. 27a. Consistent with all prior proceedings, no party objected to the magistrate judge's authority.

After hearing the evidence, the jury returned a unanimous verdict for Defendants Roell, Garibay, and Reagan, and the magistrate judge entered a final judgment in their favor. App. 28a. Withrow appealed, *pro se*, but prior to briefing the Fifth Circuit remanded the case, *sua sponte*, for the limited purpose of determining whether all parties had consented to trial before the magistrate judge. App. 12a-13a. The remand order noted that the record contained written consent by Plaintiff Withrow and Defendant Reagan, but not the other defendants. App. 13a. Accordingly, the Fifth Circuit instructed the district court "to determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written." *Id.*

On remand, Defendants Roell, Garibay, and Reagan filed written consent in the district court, expressly stating their "consent to have this case heard by the United States Magistrate Judge . . . for all purposes, including entry of judgment and jury trial." App. 22a. They also expressly confirmed "that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." *Id.*

The magistrate judge prepared a memorandum and recommendation for the district court, finding that Defendant

Reagan was the only defendant who timely filed written consent.[4] Regarding Defendants Roell and Garibay, the magistrate judge noted that "by their actions they clearly implied their consent to the jurisdiction of a magistrate," but that "implied consent does not confer jurisdiction" and Fifth Circuit precedent precludes curing that defect through belated, express consent. App. 19a.[5]

Defendants objected to the magistrate judge's report, but the district court adopted her findings and conclusions, agreeing that "Defendants Roell and Garibay did not expressly consent before trial" and that "belated consent is insufficient to cure this jurisdictional defect." App. 14a (citing *Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1108 (CA9 1999)).

The Fifth Circuit affirmed. Despite Plaintiff Withrow's and Defendant Reagan's express, pre-trial, written consent to proceed before the magistrate judge—and the express, post-judgment consent of Defendants Roell and Garibay—the Fifth Circuit

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4. The magistrate judge's order for service of process had directed each defendant to answer and to file a statement as to whether they consented to the jurisdiction of a United States Magistrate Judge. App. 17a. Defendant Reagan, then represented by private counsel, filed an answer and a separate statement consenting to trial before the magistrate judge. Defendants Roell and Garibay, both represented by the Texas Office of the Attorney General, filed answers but did not include a statement regarding consent. At the time of remand, all three Defendants, now represented by the same assistant attorney general, filed a written statement confirming their consent to proceed before the magistrate judge at all times prior and subsequent to entry of judgment. App. 22a.

5. The magistrate judge also determined that Roell and Garibay had not orally consented at hearings, App. 17a, and the Fifth Circuit held that this finding was not clearly erroneous. App. 4a-5a. Petitioners do not challenge the oral-consent finding, *per se*, in their petition for writ of certiorari.

determined that the magistrate judge lacked jurisdiction to try the case and enter judgment on the jury's verdict, requiring a remand for new trial. Acknowledging that the Seventh and Eleventh Circuits have repeatedly held post-judgment consent effective under 28 U.S.C. §636(c), the Fifth Circuit rejected these decisions as "contrary to the statute." App. 5a-10a. Like the district court, the Fifth Circuit referenced the Ninth Circuit's refusal to consider belated consent in *Hajek*, App. 6a, and aligned itself with that court. The Fifth Circuit also went further and specified that consent to a §636(c) referral must be not only express but in writing, filed before trial commences, to confer jurisdiction for the magistrate judge to preside and enter judgment. App. 11a.

In rejecting the Seventh and Eleventh Circuits' approach—under which belated, express consent cures technical defects in §636(c) referrals—the Fifth Circuit recognized that its repudiation of post-judgment, confirmatory consent imposes significant costs: "Our holding that consent must be pre-trial requires, unfortunately, that this matter be re-tried at the expense of the parties and the judicial system." App. 10a.

SUMMARY OF ARGUMENT

The Fifth Circuit's categorical rejection of post-judgment consent conflicts with the better reasoned decisions of the Seventh and Eleventh Circuits and thwarts the goals of the Federal Magistrate Act of 1979. By expanding magistrate judges' civil-trial authority, Congress sought to promote judicial efficiency and provide an alternative forum for speedy resolution of civil suits. Congress made consent the lynchpin of magistrate judges' new power, but insisted only that consent be voluntary, not that parties manifest consent in a particular manner.

Despite Congress's concern with voluntariness, not formality, the Fifth Circuit adopted a formalistic approach to consent that prohibits parties from expressly confirming—post-judgment—their

voluntary and knowing consent to proceed before a magistrate judge. In this case, the rule defeats Plaintiff Withrow's and all Defendants' trial expectations, nullifies a jury verdict, and burdens the federal docket by sending the parties back to relitigate claims already adjudicated on the merits. This perverse result is not commanded by the text of §636(c), and it defeats Congress's goal of facilitating speedy justice.

By squarely conflicting with decisions of the Seventh and Eleventh Circuits—and pushing the envelope of the Ninth Circuit's more limited rejection of post-judgment consent—the Fifth Circuit's stance exacerbates uncertainty over the type of consent necessary to effectuate magistrate judges' authority to conduct civil trials pursuant to 28 U.S.C. §636(c). This is inconsistent with Congress's desire for litigants in all federal courts—regardless of the governing circuit—to enjoy an equal opportunity to expedite litigation through the voluntary use of magistrate judges.

Additionally, the Fifth Circuit's *sua sponte* investigation into consent confuses statutory referral requirements with subject-matter jurisdiction. The Tenth Circuit, by contrast, has held that defects in referral procedures are not jurisdictional errors. This disagreement over subject-matter jurisdiction, along with the circuit conflict over post-judgment consent, warrant the Court's attention. The Court should grant the petition for writ of certiorari to answer these important and unsettled questions of federal law. *See* SUP. CT. R. 10(a), (c).

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION RAISES IMPORTANT AND UNSETTLED QUESTIONS ABOUT THE TYPE OF CONSENT REQUIRED TO INVOKE MAGISTRATE JUDGES' CIVIL-TRIAL AUTHORITY UNDER 28 U.S.C. §636(C).

In 1979, Congress amended 28 U.S.C. §636 to authorize federal magistrate judges to conduct and enter final judgments in civil trials. *See* Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (1979). In expanding magistrate judge's authority, Congress aimed "to improve access to the Federal courts," *id.*, provide relief to overburdened district judges, and "prevent inattention to a mounting queue of civil cases pushed to the back of the docket." S. REP. NO. 96-74, at 4 (1979).

To protect individual litigants' rights and the integrity of the Article III district court, magistrate judges' new authority was contingent on two factors: (1) the parties' consent; and (2) a special designation by the district court. *See* Pub. L. No. 96-82, §2(2), 93 Stat. at 643 (codified as amended at 28 U.S.C. §636(c)(1)). The consent requirement was critical, since litigants would be waiving their right to proceed before an Article III judge. *See, e.g., Peretz v. United States*, 501 U.S. 923, 931 n.8 (1991); S. REP. NO. 96-74, at 4; *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 & H.R. 2202 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice, of the House Comm. on the Judiciary*, 96th Cong. 375-80 (1979) [hereinafter "*1979 Hearings*"] (report of U.S. Department of Justice, Office for Improvements in the Administration of Justice (Jan. 19, 1978) [hereinafter "D.O.J. Report"]).[6]

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6. The federal courts of appeals have consistently upheld the constitutionality of magistrate-judges' civil-trial authority, with parties' consent, under §636(c). *See* MAGISTRATE JUDGES DIVISION OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES 148-50 (3d ed. 1999) [hereinafter "INVENTORY OF DUTIES"] (collecting cases). The constitutionality of §636(c) has never been questioned in this case by any party or the Fifth Circuit.

Congress did not, however, specify the form of consent a litigant must give to authorize a referral under §636(c). This is not surprising, because the legislative history of §636(c)(1) does not reveal an overriding concern with the formalities of consent. Rather, the goal was to ensure the voluntariness of consent and devise safeguards to prevent courts from coercing litigants to consent to magistrate-judge referrals against their wishes. *See infra* Part I.B.

The Seventh and Eleventh Circuits' acceptance of post-judgment consent protects parties' interests, promotes judicial efficiency, and satisfies the statutory scheme for civil-trial referrals established in §636(c). By contrast, the Fifth Circuit's rigid construction of §636(c) exalts form over substance to the detriment of the parties, the district courts, and magistrate judges.

This Court previously has recognized "the importance of magistrates to an efficient federal court system." *Peretz*, 501 U.S., at 929. To preserve the effectiveness of magistrate judges' vital role—and to promote consistency in parties' utilization of this valuable resource—the Court should determine whether post-judgment consent ensures the validity of judgments rendered pursuant to §636(c).

A. The Court Should Resolve the Circuit Split Over Post-Judgment Consent.

The Fifth Circuit's rejection of post-judgment consent squarely conflicts with decisions of the Seventh and Eleventh Circuits, which have repeatedly deemed post-judgment consent effective

under §636(c). *Compare Withrow*, 288 F.3d, at 203-04 (rejecting permissibility of post-judgment filing confirming parties' pre- and post-trial consent), *with, e.g., Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 883 (CA7 1998) (holding that parties' consent following appellate oral argument satisfied §636(c)'s consent requirement); *Gen. Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1496-97 (CA11 1997) (holding post-judgment consent effective when parties withdrew their request for a new trial, thereby accepting the magistrate judge's authority to enter judgment); *Am. Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381, 1385 (CA7 1995) (accepting statement of consent in party's supplemental appellate filing); *Smith v. Shawnee Library Sys.*, 60 F.3d 317, 320-21 (CA7 1995) (stating that appellate court must accept parties' offer to cure lack of consent by submitting a belated consent after appellate oral argument); *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1185 (CA7 1987) (relying on parties' joint stipulation to magistrate judge's authority filed weeks after entry of the appealed order); *cf. Rembert v. Apfel*, 213 F.3d 1331, 1335 & n.1 (CA11 2000) (reconfirming that "[p]arties can consent even after judgment" but dismissing appeal when party would not consent at oral argument); *Mark I, Inc. v. Gruber*, 38 F.3d 369, 371 (CA7 1994) (vacating judgment when party was offered a belated opportunity to consent on appeal but declined to do so); *Silberstein v. Silberstein*, 859 F.2d 40, 41-43 (CA7 1988) (recognizing that absence of consent can be "cured" when parties "stipulate *after* judgment that they had previously consented," but vacating judgment when the record contained no such stipulation).

Although the Fifth Circuit's prohibition against post-judgment consent clashes with the views of the Seventh and Eleventh Circuits, it is generally consistent with the Ninth Circuit's approach in *Hajek*. 186 F.3d, at 1108 & n.9 (rejecting party's attempt to consent, in its appellate brief, to a magistrate judge's trial authority). The Fifth and Ninth Circuits' views on consent are not, however, identical. Whereas the Fifth Circuit categorically bans

post-judgment consent and requires pre-trial consent to be in writing, App. 7a-11a, the Ninth Circuit has not been so rigid. That court declined, in *Hajek*, to foreclose the possibility that post-judgment consent might satisfy §636(c) in certain circumstances. Indeed, the Ninth Circuit recently gave credence to post-judgment written consent when it was filed in the district court and the party also had orally consented prior to the magistrate judge's dispositive ruling. *See Kofoed v. Int'l Bhd. of Elec. Workers, Local 48*, 237 F.3d 1001, 1004 (CA9 2001).

The Fifth Circuit, therefore, stands at the extreme of the circuit spectrum. And its unforgiving stance is driven by two fundamental misconceptions: first, that defining consent solely by *pre-trial* express statements prevents "gamesmanship"; and, second, that accepting post-judgment consent would impermissibly imply consent from a party's conduct. App. 8a-10a. The Fifth Circuit is mistaken on both counts.

The potential for gamesmanship is not eliminated by requiring pre-trial consent, as the Fifth Circuit erroneously reasoned. App. 9a (concluding that post-judgment consent allows parties to withhold consent until a verdict is reached and then decide whether to consent based on the outcome, but that requiring pre-trial consent removes that potential for abuse). As the Seventh Circuit has recognized, the potential for "strategy games" exists under any rule. *Smith*, 60 F.3d, at 321. Thus, "if we did not accept late consents, a litigant who knew that the *other* side had not consented could wait until judgment and raise the problem only if he lost." *Id.*

Indeed, the Fifth Circuit has encountered such strategic maneuvers. In *Caprera v. Jacobs*, 790 F.2d 442 (CA5 1986) (per curium), the court reluctantly vacated a magistrate judge's dismissal of plaintiffs' §1983 suit when all original parties consented to the magistrate judge's civil-trial authority but a defendant added by plaintiffs in an amended complaint neglected to file a form. After the magistrate judge granted defendants' Rule 12(b)(6) motion and

dismissed plaintiffs' claims, the plaintiffs protested his authority, citing the added defendant's failure to file written consent. As the Fifth Circuit bemoaned:

> "We recognize that it is unfair to allow a party, as the plaintiffs did here, to remain silent on the jurisdictional problem while awaiting the magistrate's decision, knowing it will get a second chance from the appellate court should the magistrate rule against the party. This court does not favor giving such parties 'a second bite at the apple.' However, when the objection is to jurisdiction, it cannot be waived." *Id.*, at 445.[7]

Recognizing the potential for gamesmanship under any rule, the Seventh Circuit has declined to "write a treatise on game theory," *Smith*, 60 F.3d, at 321, or let suspicion of parties' motives determine its views on consent. Its steadfast acceptance of post-judgment consent is the most appropriate approach—not because it solves the problem of gamesmanship, but because it best satisfies the goals underlying the Federal Magistrate Act. It effectuates the parties' express, voluntary consent; and it ensures effective use of judicial resources. This is particularly true when, as in Withrow's suit, all parties proceed before a magistrate judge in a manner consistent with consent; and the only parties who previously did not express consent on the record do so, post-judgment.

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7. Technical defects in consensual referrals implicate a magistrate judge's authority, not the subject-matter jurisdiction of the district court. *See infra* Part II. The *Caprera* plaintiffs objected to the magistrate judge's authority post-judgment, both in a Rule 60(b) motion and on appeal, placing the issue of consent squarely before the Fifth Circuit. But when, as in this case, no party contests consent, an appellate court should not raise the issue *sua sponte*. *See id.*

Moreover, post-judgment consent is not "implied" from the parties' conduct, as the Fifth Circuit erroneously concluded.[8] App. 9a-10a. Rather, it is an express statement of parties' agreement to proceed before a magistrate judge. *See Smith*, 60 F.3d, at 321 ("A late-submitted consent is 'an unequivocal representation that the magistrate was acting with the parties consent.'") (quoting *King*, 825 F.2d, at 1185). As the Seventh Circuit has observed, "while many courts (including our own) refuse to infer consent from the parties' behavior, and some have even insisted (without basis in the statute) on 'a clear statement by the parties,'" post-judgment consent "*is* a clear statement by the parties" and satisfies those concerns. *King*, 825 F.2d, at 1185 (citation omitted). Post-

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8. Courts have generally agreed with the Fifth Circuit's view that consent under §636(c) must be express, not implied. *See, e.g., Kofoed*, 237 F.3d, at 1004; *Rembert*, 213 F.3d, at 1334; *N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, 996 F.2d 21, 24 (CA Cir.1993); *King*, 825 F.2d, at 1185; *Ambrose v. Welch*, 729 F.2d 1084, 1085 (CA6 1984) (per curiam). *But see Archie v. Christian*, 808 F.2d 1132, 1137 (CA5 1987) (en banc) (Higginbotham, J., specially concurring) (reasoning that when parties knowingly proceeded to trial before a magistrate judge but failed to execute written consent, and "no parties objected to the magistrate's having presided over the trial, although they were well aware that a magistrate had presided . . . . [i]n every real sense they consented").

Notwithstanding courts' aversion to implied consent, the Judicial Conference Committee on the Administration of the Magistrate Judges System has endorsed "opt out" systems in which cases are randomly referred to magistrate judges and a party must expressly object to the referral if they wish to proceed instead before an Article III judge. COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM, SUPPLEMENT TO THE LONG RANGE PLAN FOR THE MAGISTRATE JUDGES SYSTEM: CIVIL AND FELONY CONSENT AUTHORITY OF MAGISTRATE JUDGES 3-4 (1993 & Supp. 1994) [hereinafter "LONG RANGE PLAN"].

judgment consent may confirm what previously was implicit in the parties' conduct, but that does not render it implied consent.

The post-judgment consent filed by Defendants Roell, Garibay, and Reagan in the district court not only was consistent with their consensual conduct before the magistrate judge, but also was an unequivocal declaration of express consent:

> "Defendants Roell, Garibay, and Reagan consent to have this case heard by the United States Magistrate Judge in the United States District Court for the Southern District, Corpus Christi Division for all purposes, including entry of judgment and jury trial. Defendants Roell, Garibay, and Reagan further notify the Court that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." App. 22a.

This express statement unconditionally confirmed Defendants' consent to proceed before the magistrate judge in accordance with §636(c), and it should have settled any question of the magistrate judge's authority to enter final judgment—as it would have in the Seventh and Eleventh Circuits. But such is not the case for litigants like Defendants Roell, Garibay, and Reagan who are sued in jurisdictions bound by the Fifth Circuit's rule.

Indeed, the circuit conflict over post-judgment consent will produce inconsistent results whenever parties knowingly and voluntarily try their case to a magistrate judge without formalizing their pre-trial consent. This defeats Congress's intent to provide "all parties in the district courts [with] equal opportunity to avail themselves of the new provisions to expedite the disposition of litigation." S. REP. NO. 96-74, at 13. To protect parties' rights, conserve judicial resources, and preserve "the importance of magistrates to an efficient federal court system," *Peretz*, 501 U.S., at 929, the Court should grant the petition for writ of certiorari and

resolve whether post-judgment consent confirms a magistrate judge's civil-trial authority under §636(c).

B. Legislative History Demonstrates That Congress's Concern Was Coercion, Not the Formalities of Consent.

The Fifth Circuit erroneously determined that both the plain language in §636(c) and the statute's legislative history compelled the court's rejection of post-judgment, confirmatory consent. App. 8a-10a. Congress, however, was concerned with preventing coercion, not dictating the manner in which parties agree to try their case before a magistrate judge.

As the Seventh Circuit has correctly observed, §636(c) "does not require a specific form or time of consent or even that it be in writing (unless the jurisdiction is to be exercised by a part-time magistrate)." *King*, 825 F.2d, at 1185; *see also* 28 U.S.C. §636(c)(1). The magistrate judge who presided over Withrow's trial was not part-time; therefore, written consent was not statutorily required to invoke her authority.

The Fifth Circuit misconstrued §636(c)'s language that "[u]pon the consent of the parties" magistrate judges "may conduct" civil trials and enter final judgments. App. 8a (quoting 28 U.S.C. §636(c)(1)). The court reasoned that post-judgment consent is "contrary to the scheme established by this language," because consent is a "condition precedent" to the magistrate judge's assuming a §636(c) role. App. 8a. Petitioners agree that a magistrate judge cannot act under §636(c) without the parties' consent, but dispute the court's inference that post-judgment consent is inconsistent with Congress's vision.

Neither Withrow nor Defendants contend that the magistrate judge acted at any time without their consent. Although Defendants Roell and Garibay did not expressly confirm consent until after judgment, App. 22a, that does not mean they did not previously

consent to proceed before the magistrate judge—to whom the case already was referred at the time of service. App. 21a.

The "upon the parties consent" language in §636(c) does not require an immediate, written expression of consent. *See King*, 825 F.2d, at 1185 (noting that while some courts insist on "a clear statement by the parties," that requirement is "without basis in the statute").[9] Rather, that language prohibits referrals to magistrate judges against the parties' wishes.

The legislative history of the Federal Magistrate Act of 1979 is replete with discussions about consent that consistently focus on its voluntariness, not its form. The Joint Explanatory Statement of the Committee of Conference to the House and Senate is particularly instructive:

9. Federal Rule of Civil Procedure 73, which complements §636(c), instructs parties to file written consent and includes a model form to submit to clerks of court. *See* FED. R. CIV. P. 73; *id.* Form 34. A magistrate judge's authority, however, comes from the statute, not this rule. Thus, many courts, including the Fifth Circuit, have not enforced strict compliance with the rule when the record otherwise documents consent. *See, e.g., Kofoed*, 237 F.3d, at 1004 (referencing Rule 73 but deeming adequate pre-judgment oral consent confirmed by post-judgment written consent); *Kadonsky v. United States*, 216 F.3d 499, 502 (CA5 2000) (accepting consent of party who did not sign the form officially recognized by Rule 73 because "he did sign a document evincing his willingness to proceed before a magistrate judge"), *cert. denied*, 531 U.S. 1176 (2001); *Silberstein*, 859 F.2d, at 43 (referencing Form 34 and expressing a preference for, but not requiring, written consent). *But see N.Y. Chinese TV Programs*, 996 F.2d, at 23-24 (emphasizing Rule 73's literal requirements). The Judicial Conference Committee on the Administration of the Magistrate Judges System has suggested that Rule 73 be amended to eliminate the written consent requirement. *See* LONG RANGE PLAN, at 4.

> "[T]he *voluntary* consent of the parties is required before a civil action may be referred to a magistrate for final decision. . . . The conferees felt that because of the possibility of coercion a strong warning should remain in the legislation that neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference . . . . [R]ules of the court must include procedures to *protect the voluntariness, knowingness, and willingness* of the consent. . . . [O]nce pretrial proceedings have commenced before a district judge or magistrate, the parties could consent to trial by a magistrate before either of these judicial officers. Of course, they also could return to the clerk's office and file their consent there. Again, in this circumstance, no coercion is to be tolerated." S. CONF. REP. NO. 96-322, at 7-8 (1979) (emphasis added).

Other discussions of voluntariness abound. And all focus on preventing coercion, not formalizing consent. *See, e.g.*, S. REP. NO. 96-74, at 5 ("The bill clearly requires the voluntary consent of the parties as a prerequisite to a magistrate's exercise of the new jurisdiction. The committee firmly believes that no pressure, tacit or expressed, should be applied to the litigants to induce them to consent to trial before the magistrates."); H.R. REP. NO. 96-287, at 2 (1979) ("The bill makes clear that the knowing and voluntary consent of the parties is required before any civil action may be referred to a magistrate; no coercion will be tolerated.").[10]

10. When Congress's fears of coercion were not borne out in practice, it amended §636(c) in 1990 to permit magistrate and district judges to encourage parties to consent to referrals, provided the encouragement was not coercive. *See* Pub. L. No. 101-650, §308(a)(2), 104 Stat. 5089, 5112 (1990) (codified at 28 U.S.C. §636(c)(2)); H.R. REP. NO. 101-734, at 27 (1990). No amendments to §636(c) since the Federal Magistrate Act of 1979 have added specifications regarding the form of consent.

Congress's concerns about voluntariness are satisfied in this case by all parties' express consent—whether pre-trial or post-judgment—coupled with indicia of consent from their litigating this case in a manner consistent with consensual referral. Neither Plaintiff Withrow, nor any defendant, alleges coercion. And all parties received the benefit of their bargain: expedient resolution before a magistrate judge.

The Fifth Circuit's effort to engraft formalities onto §636(c) is inconsistent with the parties' expectations and Congress's intent. Nothing in the statute or legislative history prohibits post-judgment consent, and the interests of justice and judicial economy are best served by respecting the final judgment entered by the magistrate judge in this case.

II. THE COURT SHOULD DECIDE WHETHER §636(C) IMPLICATES SUBJECT-MATTER JURISDICTION AND REQUIRES APPELLATE COURTS TO NULLIFY JUDGMENTS, *SUA SPONTE*, FOR LACK OF CONSENT.

Neither Plaintiff Withrow, the Defendants, nor the magistrate judge questioned the parties' consent in the district court. Yet, when Withrow appealed from the adverse jury verdict and judgment, the Fifth Circuit raised the issue of consent *sua sponte*: "When the magistrate judge enters final judgment in a suit pursuant to 28 U.S.C. §636(c), lack of consent and defects in the order of reference are jurisdictional errors that cannot be waived." App. 12a-13a.

Initiating the consent inquiry, the Fifth Circuit equated lack of consent with lack of subject-matter jurisdiction, which requires *sua sponte* consideration. But the trial court's subject-matter jurisdiction in this case was premised on federal-question jurisdiction, *see* 28 U.S.C. §1331, not any provision of the Federal Magistrate Act. And the Fifth Circuit's identification of an alleged defect in the statutory referral procedure—to which no party

objected—did not nullify the federal question that conferred subject-matter jurisdiction over Withrow's §1983 suit.[11]

Unlike the Fifth Circuit, the Tenth Circuit has correctly recognized that "[a] magistrate judge's lack of statutory authority is not a jurisdictional defect." *In re Griego*, 64 F.3d 580, 583 (CA10 1995) (holding that party's objection that the magistrate judge acted without a proper order of referral under §636(b) did not implicate subject-matter jurisdiction); *see also Clark v. Poulton*, 963 F.2d 1361, 1366-67 (CA10 1992) (distinguishing statutory authority under §636 from subject-matter jurisdiction). Thus, in the Tenth Circuit, alleged errors in a referral procedure are waived if not raised in the district court. *In re Griego*, 64 F.3d, at 583; *Clark*, 963 F.2d, at 1366-67.

Regarding Withrow's suit, no litigant objected that the referral was defective for lack of consent. Thus, that alleged defect should be deemed waived—particularly when, as here, all parties not only proceeded in a manner consistent with consent, but also expressly

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11. Other courts of appeals have examined consent *sua sponte*, but framed the inquiry in terms of their own appellate jurisdiction, which is limited to appeals from final judgments. *See* 28 U.S.C. §1291. These courts conclude that, absent consent, the magistrate judge had no authority to enter a final judgment; therefore, no reviewable order exists on appeal. *See, e.g., McNab v. J. & J. Marine, Inc.*, 240 F.3d 1326, 1327-28 (CA11 2001); *Kofoed*, 237 F.3d, at 1003-04. This justification for *sua sponte* consideration is also flawed. When a party appeals a judgment rendered by a magistrate judge pursuant to §636(c), there is a facially valid judgment within the meaning of §1291 before the court of appeals. Thus, no *sua sponte* need to consider jurisdiction exists as it would, for example, with facially interlocutory orders appealable solely under §1291's collateral-order exception. When a final judgment facially satisfies §1291, appellate courts should not delve, *sua sponte*, beneath its surface, foraging for a defect that has not drawn an objection and does not implicate the subject-matter jurisdiction of the trial court.

confirmed consent pre- or post-trial. *See Archie*, 808 F.2d, at 1137 (Higginbotham, J., specially concurring) (reasoning that when parties knowingly proceed to trial before a magistrate judge but fail to execute written consent, "I would neither find this violation of the rule to be 'jurisdictional' and not waivable, nor so substantial that we ought to consider it, *sua sponte*").

Although this Court has described magistrate judges' trial authority under §636(c) in terms of "expanded jurisdiction," it did so while discussing the scope of statutorily authorized duties, not *subject-matter* jurisdiction. *Gomez v. United States*, 490 U.S. 858, 870 (1989) (contrasting Congress's explicit grant of consensual civil-trial authority under §636(c) with delegation of felony-trial duties under §636(b)(3)). Similarly, while §636 is captioned "Jurisdiction, powers, and temporary assignment," the statute's provisions address magistrate-judge authority, not subject-matter jurisdiction. *See* 28 U.S.C. §636. This is understandable because "'jurisdiction' is a many-hued term":

> "[The Court] used it in *Gomez* as a synonym for 'authority,' not in the technical sense involving subject-matter jurisdiction. The judgment here is the judgment of the District Court; the relevant question is whether *it* had subject-matter jurisdiction; and there is no doubt that it had. The fact that the court may have improperly delegated to the Magistrate a function it should have performed personally goes to the lawfulness of the manner in which it acted, but not to its jurisdiction to act." *Peretz*, 501 U.S., at 953 (Scalia, J., dissenting) (citation omitted).[12]

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12. Justice Scalia's dissent was the only opinion in *Peretz* to discuss the distinction between statutory authority and subject-matter jurisdiction—an analysis the majority did not refute. And, although *Peretz* involved the delegation of *voir dire* supervision in a felony trial pursuant to 28 U.S.C. §636(b)(3), not a referral to a magistrate judge for trial and entry of judgment pursuant to §636(c), Justice Scalia's jurisdictional reasoning still resonates because "the jurisdiction exercised by magistrates at trial is clearly that of the Article III federal district court." D.O.J. Report, at 375; *see also* INVENTORY OF DUTIES, at 1.

Indeed, the Tenth Circuit has drawn on Justice Scalia's reasoning in *Peretz* to conclude that errors regarding magistrate judges' statutory authority do not deprive a court of subject-matter jurisdiction. *See Clark*, 963 F.2d, at 1367 (quoting *Peretz*, 501 U.S., at 953 (Scalia, J., dissenting)).

Congress was aware of the distinction between a district court's subject-matter jurisdiction and a consensual referral to a magistrate judge when it expanded magistrate judges' civil-trial authority in 1979. As a Department of Justice report submitted to Congress explained, "[i]t is the court, not the judge, to which these doctrines of subject-matter jurisdiction apply":

> "The magistrate exercises no independent jurisdiction. . . . The magistrate exercises only that subject-matter jurisdiction which is authorized by the Constitution, delegated to the district court by Act of Congress, and designated by the court itself to be available through its magistrate with the consent of the parties. . . .
>
> Therefore, jurisdiction remains in the district court, which exercises its jurisdiction through the medium of the magistrate. The defendant consents merely to an alteration on trial procedure, not to a transfer of jurisdiction from the district court to another tribunal." D.O.J. Report, at 376 (citation omitted).

Accordingly, when consent to trial before a magistrate judge is invalid, the only risk it poses is "to the authority of the court or the rights of the litigants," not subject-matter jurisdiction. *Id.*

Other contemporaneous congressional sources echo this theme. *See* H.R. REP. NO. 96-287, at 8 ("[T]he magistrate is an adjunct of the United States District Court, appointed by the court and subject to the court's direction and control. When the magistrate tries a case, jurisdiction remains in the district court and is simply exercised through the medium of the magistrate."); *1979 House Hearings*, at 385 (Judicial Conf. of the U.S., Comm. on the Admin. of the Fed. Magistrate Sys. (Jan. 30-31, 1978), Comments on S. 1613—The Magistrate Act of 1977) [hereinafter "Judicial Conf. Comments"] (same).

The district court that referred Withrow's case to the magistrate judge had subject-matter jurisdiction because Withrow brought federal constitutional claims under §1983. *See* 28 U.S.C. §1331. And it was the district court's subject-matter jurisdiction that the magistrate judge exercised pursuant to the §636(c) referral. *See* H.R. REP. NO. 96-287, at 8; D.O.J. Report, at 375-76; Judicial Conf. Comments, at 385; INVENTORY OF DUTIES, at 1.

At the time the case was referred to the magistrate judge for trial, only Plaintiff Withrow had consented in writing because no defendants had yet been served. If that referral was defective because all parties had not yet filed written consent, the defect went only to the lawfulness of the referral, not subject-matter jurisdiction. *See In re Griego*, 64 F.3d, at 583; *Clark*, 963 F.2d, at 1366-67; *cf. Peretz*, 501 U.S., at 953 (Scalia, J., dissenting); *Archie*, 808 F.2d, at 1137 (Higginbotham, J., specially concurring).

The Fifth Circuit's elevation of a statutory referral defect to an issue of subject-matter jurisdiction provides litigants like Withrow an unwarranted litigation windfall. Although Withrow expressly consented to the magistrate judge's authority, never alleged lack of consent by Defendants, and proceeded to try his case to a jury that found against him, he now gets a second bite at the apple. That result—which unjustly comes "at the expense of the parties and the judicial system," App. 10a—should not stand.

If a "jurisdictional" approach to consent is not required, the Fifth Circuit had no obligation to investigate consent *sua sponte*, and it had no basis to vacate the judgment for lack of consent when no party raised that objection. The Court should grant the petition for writ of certiorari and determine whether judicial—and litigant—resources must be squandered when no party contends that judgment was rendered without its consent.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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July 8, 2002

[Filed April 8, 2002]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40627

JON MICHAEL WITHROW,
Plaintiff-Appellant,

v.

JOSEPH C. ROELL, JERRY BALLARD,
PETRA GARIBAY, J. REAGAN, M.D.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(C-97-CV-256)

Before JOLLY, JONES, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

This matter having been referred to a magistrate judge pursuant to 28 U.S.C. § 636(c) (on referral and *upon parties' consent*, may try civil case and enter judgment), primarily at issue is whether, when all parties fail to consent pre-trial, but trial is held and judgment entered by the magistrate judge, post-judgment consent cures the pre-trial failure. Defendants contend: pre-trial, all parties consented; alternatively, their post-judgment consent confers jurisdiction on the magistrate judge. VACATED AND REMANDED.

I.

In 1997, Jon Michael Withrow, *pro se*, filed this 42 U.S.C. § 1983 action, claiming members of his prison's medical staff (Joseph Roell, Jerry Ballard, Danny Knutson, Petra Garibay, and Dr. James Reagan) acted deliberately indifferently to his medical needs, in violation of, *inter alia*, his Eighth Amendment rights. Withrow gave written consent to trial and entry of judgment by a magistrate judge.

Therefore, pursuant to 28 U.S.C. § 636(c), the district judge referred the action to a magistrate judge, but reminded that all defendants had to also consent to such participation by a magistrate judge (consent). Only Dr. Regan did so (written).

In early 1998, the magistrate judge dismissed all claims except concerning the Eighth Amendment and dismissed Ballard. (Ballard's dismissal is reflected in the final judgment entered 16 May 2000, from which this appeal is taken.) In March 1999, the magistrate judge denied summary judgement for the remaining defendants. Pre-trial, Withrow settled with Knutson; he was dismissed.

The remaining parties proceeded to trial before the magistrate judge, with a jury finding for defendants. The magistrate judge entered final judgment in May 2000, and Withrow timely appealed.

But, *sua sponte*, our court questioned whether the requisite consent had been given by all parties and ordered a limited remand for "the district court [to] determine whether the parties consented . . . and, if so, whether the consents were oral or written". *Withrow v. Roell*, No. 00-40627, at 2 (5th Cir. 21 Nov. 2000) (unpublished). Our court retained jurisdiction. *Id. See, e.g., Wheeler v. City of Columbus, Miss.*, 686 F.2d 1144, 1154 (5th Cir. 1982) (retaining jurisdiction pending district court compliance with remand).

On remand, the remaining defendants (Roell, Garibay, and Dr. Reagan (Defendants)) gave written consent. In a report and recommendation, the magistrate judge stated. pre-trial, Roell and Garibay never consented; and their post-judgment consent did not cure the jurisdictional defect. *Withrow v. Roell*, No. C-97-256, at 4 & n.3 (S.D. Tex. 8 Jan. 2001) (unpublished). Over Defendants' objections, the district court adopted the report and recommendation. *Withrow v. Roell*, No. C-97-256 (S.D. Tex. 1 Mar. 2001) (unpublished). Defendants' motion to reconsider was denied.

II.

"*Upon the consent of the parties*, a . . . United States magistrate [judge] . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment . . . when specially designated to exercise such jurisdiction by the district court." 28 U.S.C. § 636(c)(1) (emphasis added); *see* FED. R. CIV. P. 73 (procedures for consent and referral to a magistrate judge); FED. R. CIV. P. APPENDIX OF FORMS, Official Form 33 ("Notice of Availability of Magistrate Judge to Exercise Jurisdiction"); *id.*, Official Form 34 ("Consent to Exercise of Jurisdiction by a United States Magistrate Judge"). At issue is whether, pre-trial, Defendants consented; and, if they did not, whether their post-judgment consent is effective.

When, pursuant to § 636(c)(1), the magistrate judge enters final judgment, lack of consent and defects in the order of reference are jurisdictional errors; as such, they cannot be waived. *See Hill v. City of Seven Points*, 230 F.3d 167, 168-69 (5th Cir. 2000); *Mendes Jr. Int'l Co. v. M/V Sokai Maru*, 978 F.2d 920, 923-24 (5th Cir. 1992); *EEOC v. W. La. Health Servs., Inc.*, 959 F.2d 1277, 1281-82 & nn.3 & 4 (5th Cir. 1992). In keeping with this, § 636(c) consent must be express; it cannot be implied by the parties' conduct. *W. La. Health Servs.*, 959 F.2d at 1281; *Trufant v. Autocon, Inc.*, 729

F.2d 308, 309 (5th Cir. 1984) ("consent must be explicit, and will not be casually inferred from the conduct of the parties").

A.

Pre-trial, only Dr. Regan filed written consent. Defendants contend Roell and Garibay, pre-trial, gave consent orally. Whether they did involves a finding of fact, reviewed only for clear error. *E.g.*, *Walker v. City of Mesquite*, 169 F.3d 973, 982 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000).

To show Roell and Garibay's consent, Defendants point to an April 1999 teleconference, with appearances by Withrow and Defendants' counsel, at which the magistrate judge stated to the latter: "Also, if you talk to Mr. Knutson [defendant who settled pre-trial with Withrow], . . . would you tell him . . . that he needs to let us know whether he's going to consent to my jurisdiction as well, because all defendants need to consent. . . ." Defendants' counsel responded: "Good point, yes, Your Honor". According to Defendants, the import of this colloquy is that the magistrate judge "thereby stated . . . she thought Roell, Garibay, and Dr. Reagan had all consented" and Defendants' counsel confirmed that assumption.

As further evidence of Roell and Garibay's claimed pre-trial consent, Defendants cite another magistrate judge teleconference (July 1999). Withrow and Defendants' counsel appeared, together with Knutson's counsel. The magistrate judge stated to the latter: "[Y]our client [Knutson] has the right to not consent . . : and I don't know what your position is on that. . . . [A]ll of the other parties have consented. . . ." According to Defendants, these other-parties-had-consented comments were correct.

Finally, Defendants cite to the magistrate judge's statement to the jury: "In . . . any civil case in which [the] parties consent to my jurisdiction, I do have civil jurisdiction to hear civil jury trials. . . ."

Obviously, through none of these relied upon statements did Roell and Garibay consent. At best, they represent only the magistrate judge's *assumption* that they had. On remand, the magistrate judge found she had been mistaken in her assumption that Roell and Garibay *had executed consent forms*. *Withrow v. Roell*, No. C-97-256, at 2 & n.2 (S.D. Tex. 8 Jan. 2001) (unpublished). Accordingly, the basis of her assumption had been that written, not oral, consent had been given.

In short, there is no evidence in the record of pre-trial consent by all parties. The corresponding finding is not clearly erroneous.

B.

Accordingly, we must determine whether, as the district court held, the *post-judgment* consent was *not* effective. We review this jurisdictional question *de novo*. *E.g.*, *United States v. Bustos-Useche*, 273 F.3d 622, 626-27 (5th Cir. 2001).

1.

Notwithstanding the plain language of § 636(c), discussed *infra*, Defendants note the Seventh and Eleventh Circuits have repeatedly held post-judgment consent effective. *See Rembert v. Apfel*, 213 F.3d 1331, 1335 n.1 (11th Cir. 2000) ("Parties can consent even after judgment."); *Drake v. Minn. Mineral & Mfg. Co.*, 134 F.3d 878, 883 (7th Cir. 1998) (consent post-appellate oral argument sufficient); *Gen. Trading, Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1496-97 (11th Cir. 1997) (post-judgment consent effected by parties' withdrawing their new-trial motion and thereby accepting magistrate judge's judgment; such consent effective), *cert. denied*, 523 U.S. 1055 (1998); *Smith v. Shawnee Library Sys.*, 60 F.3d 317, 320-21 (7th Cir. 1995) (post-judgment consent unequivocal representation magistrate judge acting with parties' consent); *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1185 (7th Cir. 1987) (post-judgment consent sufficient where parties executed consent several weeks after entry of order appealed).

The Ninth Circuit, however, has held otherwise. *See Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1108 (9th Cir. 1999) (consent not effective where made in appellate brief). The district court cited *Hajek* in holding the post-judgment consent did not "cure the jurisdictional defect". *Withrow v. Roell*, No. C-97-256 (S.D. Tex. 1 Mar. 2001) (unpublished).

Our court's primary precedent is found in *Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987) (en banc), where a prisoner's civil rights action had been referred to a magistrate judge. Although trial was held without objection by plaintiff, *id.* at 1133-34, defendants did object. They ceased doing so, however, upon the jury's returning a favorable verdict. *Id.* at 1134.

By report and recommendation, the magistrate judge in *Archie* recommended that defendants' objection be overruled because the referral was proper under *28 U.S.C. § 636(b)*. Unlike § 636(c), which, as noted, allows a magistrate judge, upon a district judge's referral and the parties' consent, to enter final judgment in a civil action, § 636(b) only authorizes a magistrate judge, upon referral, to hear and determine certain pre-trial matters and to conduct an evidentiary hearing and then submit a recommendation to the district judge for disposition of an action. Accordingly, the magistrate judge recommended that the district court adopt the jury's findings. *Id.* The district court did so and entered final judgment. *Id.*

At issue before our en banc court was whether a trial before a magistrate judge without all parties' consent, followed by a district judge's entry of judgment, was a procedural error, subject to waiver, or was instead a jurisdictional error. Our court held that, although the parties had not consented, this did not deprive the district judge of *jurisdiction to enter the judgment*. *Id.* at 1135. But, our court noted: had the appeal challenged this defective, non-jurisdictional procedure, it would have been reversible error. *Id.* In

other words, the failure to challenge it resulted in the issue's not being before the en banc court.

In considering the necessity for consent, our court recognized that § 636(b) does not authorize referral of prisoner litigation to a magistrate judge for a jury trial. *Id.*; *see Ford v. Estelle*, 740 F.2d 374, 380 (5th Cir. 1984). Accordingly, our court observed that, because § 636(b) was unavailable, § 636(c) was the only means by which the action could be referred. *Id.*

Concerning § 636(c), our court issued the following directive:

> [I]n our circuit, no jury trial of this kind can be conducted by a magistrate [judge] without the consent of all parties, given in writing *and filed before trial commences*. . . . [I]n the exercise of our *supervisory powers*, we direct that before commencing . . . trial in any civil case in which a magistrate [judge] is to preside pursuant to . . . § 636(c), . . . he shall inquire on the record of each party whether he has filed consent to [his] presiding and shall receive an affirmative answer from each on the record before proceeding further.

Id. at 1137 (emphasis added).

At first glance, *Archie's* requiring pre-trial consent appears to control the outcome in the case at hand; here, the consent was post-judgment. This directive, however, is *dictum*. Restated, and as discussed *supra*, our court determined that the error in *Archie* was non-jurisdictional and had been waived; therefore, our court's directive as to when and how consent must be given was not necessary to the holding.

2.

Accordingly, whether, pursuant to § 636(c), post-judgment consent is effective is a question of first impression for our circuit.

Statutory interpretation begins, of course, "with the plain language of the statute". *Moosa v. INS*, 171 F.3d 994, 1008 (5th Cir. 1999). "When the language [of the statute itself] is plain we must abide by it; we may depart from its meaning only to avoid a result so bizarre that Congress could not have intended it." *Id.* (alteration in original; internal quotation marks omitted).

Our court's directive in *Archie*, that consent be pre-trial, adheres to the plain language of § 636(c)(1). The statute reads in part: "*Upon* the consent of the parties, a . . . United States magistrate [judge] . . . *may conduct* any or all proceedings in a [jury or] nonjury civil matter and order the entry of judgment in the case. . . ." 28 U.S.C. §636(c)(1) (emphasis added). The use of "upon" and "may conduct" compels the conclusion that the statute requires consent being given *before* a magistrate judge can act pursuant to § 636(c). The timing of the consent equates with a *condition precedent* to the magistrate judge's acting. In other words, only after the parties give consent is a magistrate judge then vested with jurisdiction to act. Post-judgment consent is contrary to the scheme established by this plain language.

Because the statute's language is plain, and its application does not lead to absurd results, we need not look to its legislative history. In any event, that history supports this construction. When Congress amended § 636 in 1979 to allow magistrate judges, upon consent of the parties and referral by a district judge, to handle dispositive matters, "[t]he Bill clearly require[d] the voluntary consent of the parties as a *prerequisite* to a magistrate [] [judge's] *exercise* of the new jurisdiction". S. REP. NO. 96-74, at 5 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469, 1473 (emphasis added). Consent being a "prerequisite to . . . [the] exercise of . . . jurisdiction" compels the conclusion that it must come before, and not after, the magistrate judge conducts the proceedings and enters final judgment.

A common sense reason for this being required, as reflected in *Archie's* directive, is that, if consent is allowed post-judgment, or even post-trial but pre-judgment, a party can withhold consent, hope its lack is not noticed, and, once the verdict is known: (1) if it is favorable, consent; or (2) if it is not favorable, bring the lack of consent to the attention of either the district court or the appellate court, in which case that party will be entitled to a new trial. Obviously, the potential for such abuse must be removed.

Requiring pre-trial consent does so. The Seventh Circuit in *Shawnee Library* recognized these gamesmanship concerns, but, being bound by its circuit precedent, it stated: "Rather than write a treatise on game theory, however, we simply note that *King* [*v. Ionization, Int'l*, 825 F.2d 1180, 1185 (7th Cir. 1987)] controls". 60 F.3d at 321.

A further reason why we must conclude that the Seventh and Eleventh Circuits' decisions on this issue are contrary to the statute is because their reasoning is foreclosed by our earlier-discussed circuit precedent that consent cannot be implied. The above-referenced *King* is the seminal case holding post-judgment consent effective. The earlier-cited Seventh and Eleventh Circuit decisions, with the exception of *Drake*, all rely on *King*. (Without citing authority, *Drake* held post-appellate-oral-argument consent effective, but its rationale that the post-judgment consents "*indicate* that [the parties] consented to trial by magistrate judge" is consistent with the *King* rationale, discussed below. *See Drake*, 134 F.3d at 883 (emphasis added).)

King reasoned the belated consent is effective because there, the parties' post-judgment statement that the proceedings before the magistrate judge were with their consent was "an unequivocal representation that the magistrate was acting with the parties' consent". 825 F.2d at 1185. Such reasoning, however, necessarily *infers* from the parties' *post-trial statement* that there was *pre-trial consent*. In other words, because the parties, post-judgment, state

the earlier proceedings were with their consent, that must mean the proceedings *occurred* with their consent. Again, this is simply an inference from the parties' post-trial conduct.

But, as stated, our court has held that consent may not be inferred from the parties' actions – in this instance, the post-judgment consent. *See W. La. Health Servs.*, 959 F.2d at 1281. Accordingly, because the *King* reasoning is based upon an inference of consent, it is inconsistent with our court's § 636(c) precedent.

Our holding that consent must be pre-trial requires, unfortunately, that this matter be re-tried at the expense of the parties and the judicial system. But, even if we were to adopt the Seventh and Eleventh Circuit's approach, this outcome could not be avoided in all cases. For example, had the verdict been favorable to Withrow, we doubt Defendants would have given consent post-judgment. Under that scenario, we still would be required to remand for a new trial.

III.

For these reasons, consent of all the parties must be given *prior to* a § 636(c) trial commencing. Our en banc court in *Archie*, with the opinion authorized by the late Judge Thomas Gibbs Gee, noted that § 636 "requires the consent of all parties, incorporating explicit provisions safeguarding the *voluntariness* of that consent; and rules, both federal and local, are in place to *insure that no dragooning takes place*". 808 F.2d at 1136 (emphasis added). Certainly, there can be "no dragooning"; likewise, there can be no post-judgment consent.

In her report and recommendation on remand, the magistrate judge noted our court in *Archie* had "attempted to avoid problems such as the one which occurred here by ordering, in the court's supervisory capacity, that before a trial by a magistrate judge commences, the magistrate shall confirm the consent of all parties on the record". *Withrow v. Roell*, No. C-97-256, at 4 n.3 (S.D. Tex.

8 Jan. 2001) (unpublished). To her credit, the magistrate judge sincerely regretted, and apologized for, not having done so. *Id.* at 4 n.4.

Hoping to prevent such mistakes in the future, we repeat our court's en banc directive in *Archie*:

> [I]n our circuit, no jury trial of this kind can be conducted by a magistrate [judge] without the consent of all parties, *given in writing and filed before trial commences*. . . . [I]n the exercise of our *supervisory powers*, we direct that before commencing . . . trial in any civil case in which a magistrate [judge] is to preside pursuant to . . . § 636(c), . . . he shall inquire on the record of each party whether he has filed consent to the magistrate [judges] presiding and shall receive an affirmative answer from each on the record *before proceeding further*.

Id. at 1137 (emphasis added).

For the foregoing reasons, the judgment is VACATED, and this matter is REMANDED for further proceedings, consistent with this opinion, against defendants Joseph C. Roell, Jerry Ballard, Petra Garibay, and Dr. James Reagan.

VACATED AND REMANDED

[Filed November 21, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40627
USDC No. C-97-CV-256

JON MICHAEL WITHROW,

Plaintiff-Appellant,

versus

JOSEPH C. ROELL; JERRY BALLARD;
PETRA GARIBAY; D. KNUTSON, R.N.;
J. REAGAN, M.D.; JOHN DOE, #1;
JOHN DOE, #2; JOHN DOE, #3;
Correctional Officer; JANE DOE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, BENAVIDES and DENNIS, Circuit Judges.

BY THE COURT:

Jon Michael Withrow, pro se Texas prisoner # 675379, moves this court for a copy of his trial transcript at government expense. This court must consider, sua sponte if necessary, whether there was effective consent for the magistrate judge to enter a final judgment. See Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). Upon written consent of the parties and designation by the district court, 28 U.S.C. § 636(c)(1) authorizes a magistrate judge to conduct "any or all proceedings in a jury or nonjury civil matter"

and to enter final judgment in the case. 28 U.S.C. § 636(c)(1); Archie v. Christian, 808 F.2d 1132, 1135 n.3 (5th Cir. 1987) (en banc); Fed. R. Civ. P. 73. When the magistrate judge enters final judgment in a suit pursuant to 28 U.S.C. § 636(c)(1), lack of consent and defects in the order of reference are jurisdictional errors that cannot be waived. EEOC v. West Louisiana Health Servs., Inc., 959 F.2d 1277, 1281-82 & nn.3 and 4 (5th Cir. 1992); see also Mendes Jr. Int'l Co. v. M/V Sokai Maru, 978 F.2d 920, 923-24 (5th Cir. 1992).

Although the record reflects that Withrow and defendant Reagan consented in writing to proceed before the magistrate judge, the record does not contain written consent forms signed by any other defendant. Accordingly, IT IS ORDERED that the case is REMANDED for the limited purpose of determining whether all of the parties consented under 28 U.S.C. § 636(c)(1) to proceed before the magistrate judge. On remand, the district court should determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written. To the extent that this court has appellate jurisdiction, we retain jurisdiction of this appeal, including jurisdiction over Withrow's motion for a transcript at government expense, pending the district court's compliance with the limited remand. See, e.g., Wheeler v. City of Columbus, 686 F.2d 1144, 1154 (5th Cir. 1982).

REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. C-97-256
	§	
JOSEPH C. ROELL, ET AL.,	§	
	§	
Defendants.	§	

ORDER ADOPTING FINDINGS OF MAGISTRATE JUDGE

On November 21, 2000, the Fifth Circuit remanded this matter for the limited purpose of determining whether all of the parties consented under 28 U.S.C. § 636(c) to proceed before the Magistrate Judge. On January 9, 2001, the Magistrate Judge filed her Memorandum and Recommendation finding that express consent from Defendants Roell and Garibay was not received before trial. Defendants Roell and Garibay object contending that they consented before trial. Having reviewed the pleadings on file, this Court adopts as its own the findings and conclusions of the Magistrate Judge. Defendants Roell and Garibay did not expressly consent before trial despite Defendants' contention that lack of action actually constitutes action. Defendants Roell and Garibay filed express consent on December 7, 2000 -- after the April 27, 1999, selection of the jury and May 16, 2000, rendering of final judgment. However, belated consent is insufficient to cure the jurisdictional defect. *Hajek v. Burlington Northern R.R. Co.*, 186 F.3d 1105, 1108 (9th Cir. 1999).

ORDERED this 1st day of March, 2001.

/s/ H. W. Head, Jr.
H.W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW §

V. § C. A. NO. C-97-256

JOSEPH C. ROELL, ET AL. §

MEMORANDUM AND RECOMMENDATION

On November 21, 2000, the United States Court of Appeals for the Fifth Circuit remanded this case to the District Court for the limited purpose of determining whether all defendants consented to trial before a magistrate judge (D.E. 213). 28 U.S.C. § 636. Defendants Reagan, Roell, and Garibay also moved the court to find that the defendants consented to the jurisdiction of a United States Magistrate Judge (D.E. 216). Both matters were referred to undersigned United States Magistrate Judge for report and recommendation. A review of the record clearly reflects that the express and written consent of defendants Roell and Garibay was not received until December 7, 2000 (D.E. 215).

BACKGROUND

Plaintiff, proceeding *pro se*, filed this lawsuit pursuant to 42 U.S.C. § 1983, alleging that prison officials were deliberately indifferent to his serious medical needs when he fell from his bunk and broke his ankle. After an evidentiary hearing was conducted (D.E. 17), plaintiff filed a written consent to proceed before a United States Magistrate Judge (D.E. 28). The case was reassigned to a United States Magistrate Judge for purposes of conducting all further proceedings, including entry of final judgment (D.E. 30). Citing Neals v. Norwood, 59 F.3d 530 (5th Cir. 1995), the District Court ordered that defendants joined in the case be given an

opportunity to consent to the jurisdiction of the magistrate judge (D.E.30).

On January 12, 1998 (D.E. 34), June 15, 1998 (D.E. 47), July 16, 1998 (D.E. 53), August 12, 1998 (D.E. 61), September 11, 1998 (D.E. 68), November 11, 1998 (D.E. 76), February 23, 1999 (D.E. 113), service of process was ordered as to various defendants. In each order for service of process defendants were directed to file a statement as to whether they consented to the jurisdiction of a United States Magistrate Judge. Defendant Reagan filed his answer July 27, 1998 (D.E. 58), defendant Roell on August 21, 1998 (D.E. 63), defendant Garibay on October 7, 1998 (D.E. 72), and defendant Knutson on April 23, 1999 (D.E. 140), June 10, 1999 (D.E. 144), and June 24, 1999 (D.E. 148).

Of the four defendants joined and served, only defendant Reagan complied with the order for service of process by executing a written consent form (D.E. 65). A review of recorded hearings held April 27, 1999 (D.E. 141), July 21, 1999 (D.E. 151), November 17, 1999 (D.E. 157), January 4, 2000 (D.E. 159), April 26, 2000 (D.E. 185) and April 27, 2000 (D.E. 188), reveals that express oral consent was never sought or given by defendants Garibay and Roell. During the hearing held on April 27, 1999, the issue of whether defendant Knutsen intended to consent to a magistrate was discussed,[1] but there was no mention of consent by defendants Garibay and Roell.[2] The case was scheduled for jury trial before a magistrate judge without objection from either defendant Garibay or Roell, but again the issue of consent was not discussed during the scheduling conference. At the time of jury

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[1] Knutsen did not consent orally or in writing. Plaintiff settled with defendant Knutsen, and voluntarily withdrew his claims (D.E. 152).

[2] The court wrongly assumed that defendants Garibay and Roell had already executed consent forms.

selection, the court announced to the petit panel that the parties had consented to a trial before a United States Magistrate Judge (4/27/00, Tape 1/1750-75). While no party objected to this statement of jurisdiction, express consent was neither requested nor received.

On April 27, 1999, a jury was selected and trial commenced thereafter (D.E. 188). The jury returned a verdict in favor of defendants Garibay, Roell, and Reagan (D.E. 201). Final judgment was entered by undersigned United States Magistrate Judge May 16, 2000 (D.E. 203).

APPLICABLE LAW

A magistrate judge may conduct a jury trial and enter judgment if all parties consent to such jurisdiction and the District Court makes the appropriate reference. 28 U.S.C. 636(c)(1); Mendes Jr. Int'l Co. v. M/V Sokai Maru, 978 F.2d 920, 922-23 (5th Cir. 1992). If a magistrate judge enters judgment, absence of appropriate consent and a reference order results in lack of jurisdiction. Id.; Hill v. City of Seven Points, 230 F.3d 167, 168 (5th Cir. 2000). In this circuit consent cannot be implied by the conduct of the parties, EEOC v. West Louisiana Health Services, Inc., 959 F.2d 1277, 1281 (5th Cir. 1992) (citing Archie v. Christian, 808 F.2d 1132, 1137 (5th Cir. 1987) (en banc)), and the jurisdictional defect cannot be waived. Id. at 1282 (citing McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 925 F.2d 853, 857 (5th cir. 1991)).

The Seventh Circuit has held that unequivocal consent filed by the parties after the entry of judgment cures the jurisdictional defect, American Suzuki Motor Corp. v. Bill Kummer, Inc., 65 F.3d 1381, 1385 (7th Cir. 1995) (citing King v. Ionization Intern., Inc. 825 F.2d 1180, 1185 (5th Cir. 1987)), but this approach has been rejected by the Ninth and Eleventh Circuits. See Hajek v. Burlington Northern R.R. Co., 186 F.3d 1105, 1108 (9th Cir. 1999); Rembert v. Apfel, 213 F.3d 1331, 1335 (11th Cir. 2000).

Here, the record clearly reflects that defendants Roell and Garibay did not consent orally or in writing.[3] Although by their actions they clearly implied their consent to the jurisdiction of a magistrate, implied consent does not confer jurisdiction. The issue of whether the December 7, 2000, filing of a belated consent form cures this defect has not been addressed by the Fifth Circuit. But if circuit law does not permit implied consent, then belated consent seems even less consistent with the limited statutory grant of consent jurisdiction set forth in 28 U.S.C. §636.[4]

RECOMMENDATION

It is recommended that the District Court report to the Fifth Circuit Court of Appeals that the record does not support a finding of express oral or written consent by defendants Roell and Garibay prior to December 7, 2000. Defendant's motion to find consent (D.E. 216) should be denied.

Respectfully submitted 8 day of January, 2001.

/s/ B. Janice Ellington
B. JANICE ELLINGTON
UNITED STATES MAGISTRATE JUDGE

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[3] The Fifth Circuit attempted to avoid problems such as the one which occurred here by ordering, in the court's supervisory capacity, that before a trial by a magistrate judge commences, the magistrate shall confirm the consent of all parties on the record. Archie v. Christian, 808 F.2d at 1137.

[4] Frankly, undersigned is disturbed that she would make a careless mistake which caused inconvenience and expense to the parties, the court, and the jurors. The District Judge could not have known of the problem because it occurred after the case was reassigned. The court apologizes to all persons affected by the error.

[Filed December 15, 1997]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW	§	
	§	
v.	§	CIVIL ACTION NO. C-97-256
	§	
JOSEPH C. ROELL, ET AL	§	

CONSENT TO PROCEED BEFORE A MAGISTRATE JUDGE

Under 28 U.S.C. Sec 636(c), the parties to this civil matter waive their right to proceed before a District Judge and consent to have a United States Magistrate Judge conduct all further proceedings, including the trial and judgment. The U. S. Magistrate Judge has the authority to conduct trials by jury, and the parties understand that they are not waiving their rights to a trial by jury by this consent to proceed before the U.S. Magistrate Judge. Appeal shall be to the United States Court of Appeals for the Fifth Circuit under 28 U.S.C. 636(c)(3).

/s/ Jon Michael Withrow _____

Jon Michael Withrow _____

Plaintiff, Pro Se _____

ORDER OF REFERENCE

It is ordered that this matter is assigned to a United States Magistrate Judge to Conduct all further proceedings, including final judgment.

_____ _____

Date U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW	§	
	§	
v.	§	C. A. NO. C-97-256
	§	
JOSEPH C. ROELL, ET AL.	§	

ORDER OF REFERENCE

Consistent with the plaintiff's consent to proceed to trial before a magistrate judge (D.E. 28), the court assigns this case to United States Magistrate Judge B. Janice Ellington for all further proceedings and entry of judgment in accordance with 28 U.S.C. 636(c); Neals v. Norwood, 59 F.3d 530 (5th Cir. 1995). Any appeal will proceed directly to the United States Court of Appeals for the Fifth Circuit.

In the event defendants are joined and service of process is ordered, all defendants will be given an opportunity to consent to the jurisdiction of the magistrate judge. If all defendants do not consent, this order of reference will be vacated, and the case will be returned to the docket of this judge for final disposition. Id.

ORDERED this 29 day of Dec, 1997.

/s/ H.W. Head, Jr.
HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

[Filed December 7, 2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW, *Plaintiff*,	§	
v.	§	Civil Action No. C-97-256
JOSEPH C. ROELL, ET Al., *Defendants*.	§	

DEFENDANTS ROELL, GARIBAY, AND REAGAN'S CONSENT TO PROCEED BEFORE UNITED STATES MAGISTRATE JUDGE

In accordance with the terms of 28 U.S.C. §636(c) and its provisions for the placement of cases such as the immediate one on an expedited docket before a United States Magistrate Judge, Defendants Roell, Garibay, and Reagan consent to have this case heard by the United States Magistrate Judge in the United States District Court for the Southern District, Corpus Christi Division for all purposes, including entry of judgment and jury trial. Defendants Roell, Garibay, and Reagan further notify the Court that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

MICHAEL T. McCAUL
Deputy Attorney General for
Criminal Justice

PHILLIP E. MARRUS
Assistant Attorney General
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/s/ Charles K. Eldred
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P.O. Box 12548, Capitol Station
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(512) 463-2080
Fax No. (512) 495-9139

ATTORNEYS FOR DEFENDANTS
ROELL, GARIBAY, AND REAGAN

CERTIFICATE OF SERVICE

I, Charles K. Eldred, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of **Defendant Roell, Garibay, and Reagan's Consent to Proceed Before United States Magistrate Judge** has been served by placing same in the U.S. Mail on December 5, 2000, addressed as follows:

Jon Michael Withrow
TDCJ No. 675379
Coffield Unit
Route 1, Box 150
Tennessee Colony, Texas 75884

/s/ Charles K. Eldred
CHARLES K. ELDRED
Assistant Attorney General

[Excerpt from Order Denying Defendants' Motion for Summary Judgment]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW	§	
	§	
v.	§	C. A. NO. C-97-256
	§	
JOSEPH C. ROELL, ET AL.	§	

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff is a prisoner in the Texas Department of Criminal Justice, Institutional Division ("TDCJ-ID") and is currently incarcerated at the Connally Unit in Kenedy, Texas. Proceeding *pro se* and *in forma pauperis*, plaintiff filed his original civil rights complaint pursuant to 42 U.S.C. § 1983, alleging that defendants Joseph Roell, Petra Garibay, and James Reagan, medical personnel at the Garza West/East Unit, were deliberately indifferent to his medical needs, thereby violating his Eighth Amendment right to be free from cruel and unusual punishment (D.E. 1).[5] Defendants now move for summary judgment (D.E.

[5] Service of process on defendant Danny Knutson has not yet been accomplished. Plaintiff's due process, conspiracy, and failure to train and supervise claims against all defendants and plaintiff's claims against defendant Ballard and Jane Doe were dismissed by order entered January 14, 1998 (D.E. 33). John and Jane Doe defendants were dismissed by order entered July 20, 1998 (D.E. 56).

78). Plaintiff has filed a response in opposition to the motion for summary judgment (D.E. 93, 94, 95, 96, 97).

By order of reference entered December 30, 1997, this case was referred to the undersigned to conduct all further proceedings, including entry of final judgment, in accordance with 28 U.S.C. § 636(c)(1) (D.E. 30). For the reasons stated herein, the Court denies defendants' motion for summary judgment.

. . . .

ORDERED this 2 day of March, 1999.

/s/ B. Janice Ellington
B. JANICE ELLINGTON
UNITED STATES MAGISTRATE
JUDGE

[Excerpt from April 27, 2000 trial transcript, p. 37]

THE COURT: Thank you. You may be seated. Good morning, members of the panel. As you just heard, my name is Janice Ellington and I'm a United States Magistrate Judge. Ordinarily Magistrate Judges are appointed judges and we serve as adjuncts to the federal district court judges. In this case -- or in any civil case in which both parties consent to my jurisdiction, I do have a civil jurisdiction to hear civil jury trials and that's what we have scheduled this morning.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JON MICHAEL WITHROW §

v. § C. A. NO. C-97-256

JOSEPH C. ROELL, ET AL. §

FINAL JUDGMENT

Final judgment based on the jury's verdict that plaintiff take nothing from defendants Petra Garibay, James Reagan and Joseph Roell is entered. Final Judgment dismissing defendants Ballard, Knutsen, Gariloy, and all John and Jane Does is entered.

ORDERED this 15 day of May, 2000.

/s/ B. Janice Ellington
B. JANICE ELLINGTON
UNITED STATES MAGISTRATE
JUDGE